

Notice of Proposed Regulatory Action
The State Board of Equalization Proposes to Adopt Amendments to
California Code of Regulations, Title 18,
Section 1603, *Taxable Sales of Food Products*

NOTICE IS HEREBY GIVEN

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*. The proposed amendments add subdivision (u) to the regulation to describe the term “mobile food vendors,” provide that, “[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors’ sales of taxable items are presumed to be made on a tax included basis,” and provide that the “presumption does not apply when a mobile food vendor is making sales as a ‘caterer’ as defined in” subdivision (h)(1) of the regulation. The proposed amendments are intended to make the regulation consistent with the current practice in the mobile food industry, which is for mobile food vendors to include sales tax reimbursement in their menu prices.

PUBLIC HEARING

The Board will conduct a meeting in the Auditorium Room, at the California Public Utilities Commission’s headquarters, located at 505 Van Ness Avenue, San Francisco, California, on March 25, 2014. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 10:00 a.m. or as soon thereafter as the matter may be heard on March 25, 2014. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1603.

AUTHORITY

RTC section 7051

REFERENCE

RTC sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374, and 6376.5.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

In 2001, Regulation 1574, *Vending Machine Operators*, was amended to delete the specific requirement that vending machine operators post a sign providing that their sales are made on a tax-included basis and to instead provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

Mobile food vendors sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts. Mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions.

Additionally, they often make sales in multiple tax districts in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the

meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the industry practice is for mobile food vendors to include sales tax reimbursement in their menu prices, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff drafted amendments adding a new subdivision (u) to Regulation 1603 to address the mobile food vendors' signage issue. The draft amendments suggested adding provisions to the regulation to describe the term "mobile food vendors" by providing that mobile food vendors include retailers who sell food and beverage for immediate consumption from motorized vehicles or un-motorized carts, and provide that mobile food vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis, unless a separate amount for tax reimbursement is added to the price. And, the draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties' questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption

will be “[e]ffective July 1, 2014” and instead include new language stating that it will apply to “[s]ales made on or after July 1, 2014.” BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

November 19, 2013, BTC Meeting

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board’s November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes “mobile food vendors,” and provides that, “[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors’ sales of taxable items are presumed to be made on a tax included basis,” and provide that “[t]his presumption does not apply when a mobile food vendor is making sales as a ‘caterer’” as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board’s discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors’ sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors’ collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1603 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1603 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Cary Huxsoll, Tax Counsel III, by telephone at (916) 323-3092, by e-mail at Cary.Huxsoll@boe.ca.gov, or by mail at State Board of Equalization, Attn: Cary Huxsoll, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on March 25, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1603 during the March 25-26, 2014, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1603. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1603 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1603, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1603 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1603, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.